No. 18143

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAMA COMPANY, a corporation,

Appellant,

vs.

UNION BANK, *et al.*,

Appellees.

REPLY BRIEF OF APPELLEE UNION BANK.

LOEB AND LOEB,
ALFRED I. ROTHMAN,
ROBERT A. HOLTZMAN,
523 West Sixth Street,
Los Angeles 14, California,
Attorneys for Appellee Union Bank.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

No. 18143

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LAMA COMPANY, a corporation,

Appellant,

vs.

UNION BANK, *et al.*,

Appellees.

REPLY BRIEF OF APPELLEE UNION BANK.

By the within appeal, Lama Company attempts to reopen questions concerning the jurisdiction of the District Court, sitting as a court of Bankruptcy, that are so well settled as to admit of no substantial dispute. It would appear that Appellant's argument, based solely upon convenience, is inappropriate in this Court (or for that matter, in any court), and, moreover, that if followed it would give rise to a dangerous and unwise precedent.

Jurisdiction.

Although summary jurisdiction was *invoked* under the Bankruptcy Act, the Referee found that he had no summary jurisdiction over Union Bank (which had appeared specially in order to raise the question of jurisdiction) and dismissed the petition, insofar as Union

Bank was concerned, for lack of jurisdiction [Tr. pp. 11, 39, 41, 42, 43, see also pp. 34, 37]. Jurisdiction to review this decision exists by virtue of Section 24 of the Bankruptcy Act, 11 U. S. C. Section 47.

Introductory Statement.

Having appeared only specially, and having been advised by the Referee that its objection to the exercise of summary jurisdiction over it was well taken, Union Bank could not adduce evidence bearing upon the merits of the controversy without running the risk of waiving its objection to the exercise of summary jurisdiction. Thus, the only evidence before the Referee was that presented by the Appellant and the Trustee; Union Bank tendered no evidence, called no witnesses, and did not cross-examine.

No transcript of the proceedings before the Referee having been certified to this Court, all findings must be deemed to be supported by the evidence.[1]

Insofar as the appeal with respect to Appellee Union Bank is concerned, appellant asks this court to hold, in substance, that the Referee had summary *in personam* jurisdiction over Union Bank, although it was not otherwise, in any way, party to the bankruptcy proceedings,

---

[1]The District Court was required to accept the Referee's findings of fact unless clearly erroneous. General Order No. 47, and the scope of appellate review is governed by the same standard, Rule 52, F. R. C. P. See *Hudson v. Wylie*, 242 F. 2d 435, 450 (9 Cir., 1957).

where it had duly objected to the exercise of summary jurisdiction, and where the obligation sought to be adjudicated was the claim of Appellant, a post-bankruptcy creditor seeking to recover rent from the Trustee, that Union Bank should also pay rent to it because it had a security interest in some of the bankrupt's equipment, which equipment was ultimately abandoned by the trustee. Although it is clear that the Referee could properly adjudicate Appellant's claim against the Trustee, we shall demonstrate that it does not follow, as Appellant claims, that he had the further power to adjudicate Appellant's claim against the Bank, whatever the subject-matter relationship of the two claims.

ARGUMENT.

I.

The Trustee's Liability for Administrative Rent Is Determined, Not by the Terms of the Bankrupt's Former Lease, but by the Fair and Reasonable Value of the Premises Occupied to the Bankrupt Estate.

It is well settled that the trustee may continue to occupy leased premises formerly occupied by the bankrupt, that it is obligated to pay rent therefor, and that if it does not pay the lessor may properly present a claim for administrative rent and petition the Bankruptcy Court for allowance of the claim.

> Bankruptcy Act, Sec. 62(a)(1), 11 U. S. C. Sec. 102(a)(1);
>
> 3 Collier on Bankruptcy, 14th Ed., Par. 62.14[2], p. 1511.

It is equally well settled that where the Trustee has elected to reject the bankrupt's lease and surrender the leased premises, its liability for post-bankruptcy rent prior to the surrender is not measured by the former lease (which ceases to exist for all purposes) but rather by the value of the use of the premises reasonably necessary for the preservation of the bankrupt estate.

> 3 Collier on Bankruptcy, 14th Ed., Par. 62.14[2], pp. 1512-1514.

The Referee found the fair and reasonable value of the space necessarily occupied by the Trustee to have been $701.76 and awarded this sum, together with other sums totaling $104.21, to Appellant [Tr. pp. 41-

42, 43]. Union Bank is not in any way concerned with this determination and expresses no opinion with regard to it except to concede that the Referee had jurisdiction to make it. No evidence being before this Court, apart from the findings, the amount, of course, cannot be claimed now either to be excessive or inadequate.

II.

The Existence of a Duty on the Part of the Trustee to Pay Rent Does Not Create Jurisdiction in the Bankruptcy Court to Order a Secured Creditor to Pay Additional Rent.

Appellant's case, in sum, proceeds on the assumption that the power of the Court to order the Trustee to pay rent gives rise, by implication, to a further power to charge a stranger to the bankruptcy proceedings with some portion of that rent. Petitioner cites no authority for this startling proposition, which is inconsistent with basic concepts of bankruptcy jurisdiction, and directly contrary to the authorities discussed hereinbelow.

As a general proposition, a court of bankruptcy does not have summary jurisdiction to enter an *in personam* judgment over an adverse party who has made timely objection to the exercise of such jurisdiction. More particularly, except where title to property actually or constructively in the possession of the bankrupt is at issue, the rule is that a court of bankruptcy lacks jurisdiction over a controversy between third persons.

The decision of this Court in *Evarts v. Eloy Gin Corp.*, 204 F. 2d 712 (9th Cir., 1953), cert. den. 346 U. S. 876, 98 L. Ed. 384, 74 S. Ct. 129 (1953) is

squarely in point. In this case, one Evarts, a specialist in the field of liquidating the assets of corporations in financial difficulty and procuring new funds to aid ailing businesses, claimed to have performed services for the benefit of three corporations in the process of reorganization under Chapter XI, at the instance of the receiver, the president of the three corporations, and an interested purchaser. He filed a claim for his compensation in the arrangements proceedings, seeking an order for payment against the receiver and the president of the corporations personally, and a declaration that the claim be declared an obligation of the prospective purchaser. The referee, on his own motion, dismissed the petition as to the president and the prospective purchaser for lack of jurisdiction, retained jurisdiction as to the receiver, and denied the claim as to him on the merits. The district court approved and confirmed the orders of the referee, and, on appeal, this Court affirmed. After discussing in detail the limited and specific nature of the jurisdiction of the Bankruptcy Court, this Court concluded:

> "The Bankruptcy Court has no jurisdiction in controversies between third parties not involving the debtor or his property * * *. It is clear that Pretzer (the president), as an individual, was a third party to the debtor proceedings; and as to any claim of petitioner's against him it is purely personal and cannot involve the property while it was held by the Receiver. The Bankruptcy Court's order of dismissal as to Pretzer was proper.
>
> "Landers (the purchaser) was the principal creditor of the Debtor Corporations at the time of appellant's petition, having obtained an assignment

of most of the claims against the Debtor Corporations outside of the Arrangement Proceedings. As a creditor of the Debtor Corporations he was subject to the Bankruptcy Court's jurisdiction in his dealings with the debtors; but he was not subject to the Bankruptcy Court's jurisdiction in his dealings with third parties, in which category Evarts falls. Therefore, the Bankruptcy Court's jurisdiction over appellant's claim against Landers was properly declined." 204 F. 2d at 717.

The *Evarts* case is completely dispositive of this appeal. Landers, like Union Bank a creditor of the debtors, had subjected himself to the jurisdiction of the Bankruptcy Court as to his claims; notwithstanding, no jurisdiction existed as to the controversy between him and Evarts. *A fortiori,* there can be no jurisdiction as to Union Bank, which has never presented a creditor's claim or otherwise subjected itself to summary jurisdiction.

The rule of law articulated in *Evarts* has been consistently followed both by this Court and by other federal courts.

See, for example:

Kaplan v. Guttman, 217 F. 2d 481, 485 (9th Cir., 1954);

In re Lubliner & Trinz Theatres, 100 F. 2d 646 (7th Cir., 1938);

In re Hotel Martin of Utica, 94 F. 2d 643 (7th Cir., 1938);

In re Third Avenue Transit Corporation, 153 Fed. Supp. 706 (S. D. N. Y., 1957);

8 Collier on Bankruptcy, 14th Ed., Par. 3.02, Note 2 at p. 124.

See also:

Central State Corp. v. Luther, 215 F. 2d 38 (10th Cir., 1954);

In re Production Aids, Inc., 193 Fed. Supp. 180 (S. D. Ia., 1961).

Indeed it has been stated that even if the parties had consented, they could not by so doing invest the Bankruptcy Court with jurisdiction to determine a controversy such as this.

In re Chakos, 24 F. 2d 482, 485 (7th Cir., 1928).

III.
Appellant's Arguments From Convenience Are Without Merit.

In its argument from convenience, Appellant assumes, first, that "the user of premises has an implied duty to pay for the same, unless the owner agrees that the premises are furnished gratuitously" (App. Op. Br. p. 5), and second, that Union Bank "used" Appellant's premises under circumstances sufficient to give rise to this "implied duty." These assumptions are baseless, both legally and factually.

In the first place, no contractual or quasi-contractual obligation to pay is pleaded or appears to be claimed; Appellant proceeds on the theory that the occupancy of the premises, without more, gives rise to the implied duty referred to. But such a duty would

exist only if the occupancy constituted a trespass. In this instance, while intennt need not be shown, it would be incumbent upon Appellant to plead and show, at the minimum, wilful or voluntary occupancy on the part of Union Bank. This has not been done.

It may not be assumed on this record that Union Bank's occupancy of the premises was voluntary. The findings indicate the contrary to be true. The Trustee (then the Receiver) secured and blocked off the premises containing the equipment in which the Bank held an interest, taking possession of the equipment, and as effectively barring the Bank from it as Appellant was barred from its premises [Tr. p. 40]. The Trustee ultimately abandoned the equipment at some time after July 30, 1961 [Tr. p. 40]. It must be remembered that Union Bank introduced no evidence and thus *its* evidence concerning its dealings with the Receiver and the Appellant was not before the Referee. But even on the limited record available, the absence of wilfulness is manifest.

Appellant's argument from convenience proceeds on the assumption that Union Bank *must* be liable to it and that a suit in state court will only delay the ultimate result. As indicated, this assumption finds no support, either in law, or in the findings of the Referee. In fact, in the absence of jurisdiction over Union Bank, the referee should not even have found, as he purported to do, that Union Bank received value.[2]

---

[2]In view of the judgment of dismissal and consequent lack of prejudice, Union Bank did not appeal from this finding.

Appellant suggests that the refusal of the Court below to exercise jurisdiction over Union Bank was tantamount to an instruction for it to institute state court proceedings against both the Trustee and Union Bank (App. Op. Br. p. 6). Surely Appellant does not mean this; it already has a judgment against the Trustee. While the denial of summary jurisdiction in any case leaves a plenary suit as the only alternative, it is in no sense an invitation to file such a suit, particularly where all proper relief has been granted. Appellant really means that in the absence of an agreement to pay rent it may have difficulty in proving a case in state court; it prefers the summary, relatively informal procedure of the bankruptcy court to the more time-consuming procedure of a state court. The fact that Appellant finds it more convenient and perhaps tactically advantageous to proceed in a single suit, in the bankruptcy court, is no reason, however, to deny Union Bank its right to a plenary trial if it deems it desirable to exercise that right.

Conclusion.

For each and all of the foregoing reasons the order of The Honorable William M. Byrne, United States District Judge, dated May 22, 1962, affirming the order of the Referee in Bankruptcy, should be affirmed.

Respectfully submitted,

LOEB AND LOEB,
ALFRED I. ROTHMAN,
ROBERT A. HOLTZMAN,
Attorneys for Appellee Union Bank.

Certificate.

I certify that, in connection with the preparation of this brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ROBERT A. HOLTZMAN.